Supreme Court, U. S.
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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1976

No. ——— 76-1832

MARION A. BUNYARD, ET AL ..... *Petitioners*

VS.

JO ANNE FRANCO,
ADMINISTRATRIX, ET AL ..... *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

The petitioners, Marion A. Bunyard and Bunyard Supply Co., Inc., respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Arkansas, entered in the above-entitled cause on February 28, 1977.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of the State of Arkansas is not yet reported officially, but is unofficially reported in 547 S.W. 2d 91 (1977) and printed in Appendix "A" hereto, *infra*, p. 13. The order of the Circuit Court of Washington County, Arkansas, granting petitioners' motion for summary judgment is unreported and is printed in Appendix "B" hereto, *infra*, p. 19.

JURISDICTION

The judgment of the Supreme Court of the State of Arkansas was entered on February 28, 1977, p. 13, *infra*. The petitioners herein filed a timely motion for rehearing which was denied on March 28, 1977, and this petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3) in that the respondents are asserting a cause of action based on alleged violations of the Federal Gun Control Act of 1968 (18 U.S.C. Section 921-928) and regulations promulgated pursuant thereto.

QUESTIONS PRESENTED FOR REVIEW

(1) Whether alleged violations of the Federal Gu... Control Act of 1968 (contained in 18 U.S.C. Section 921-928) may be used by individuals in a civil proceeding for damages in a state court.

(2) Whether the purpose of the record keeping regulations issued by the Secretary of the Treasury pursuant to the Gun Control Act of 1968 is to prevent guns from coming into the hands of criminals and fugitives from justice, or is the purpose to aid law enforcement officers and the Treasury Department in checking gun sales and determining who bought the guns.

(3) Whether it is negligence as a matter of law for a licensed gun dealer to fail to complete Form 4473 even though he complies with the substantive provisions of the Gun Control Act of 1968.

(4) Whether, under Regulations promulgated by the Secretary of the Treasury pursuant to the Gun Control Act, identification in a "... manner customarily used in commercial transactions ..." means that the purchaser must be identified by his driver's license, or may he be identified by persons working in the business establishment in any other manner customary in the same and similar locality.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved in this cause are as follows: United States Code, Title 18, Chapter 44, p. 4264 Section 922.

Unlawful Acts.

(d) It shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person —

(1) is under indictment for, or has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) is a fugitive from justice;

Code of Federal Regulations, Chapter 27, page 171 Section 178.99, Certain Prohibited Sales or Deliveries

(c) A licensed importer, licensed manufacturer, licensed dealer, or licensed collector shall not sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person (1) is, except as provided under Section 178.143, under indictment for, or, except as provided under Section 178.144, has been convicted in any court of a crime punishable by imprisonment for a term exceeding 1 year, (2) is a fugitive from justice, (3) is an unlawful user of or addicted to marijuana or

any depressant or stimulant drug (as defined in Section 201(v) of the Federal Food, Drug, and Cosmetic Act; 21 U.S.C. 321(v)), or narcotic drug (as defined in Section 4731(a) of the Internal Revenue Code of 1954), or (4) has been adjudicated as a mental defective or has been committed to any mental institution.

Code of Federal Regulations, Chapter 27, page 177, Section 178.124, Firearms Transaction Record

(c) Prior to making an over-the-counter transfer of a firearm to a non-licensee who is a resident of the State in which the licensee maintains his business or collection premises, the licensed importer, licensed manufacturer, licensed dealer, or licensed collector so transferring the firearm shall obtain a Form 4473 from the transferee showing the name, address, date and place of birth, height, weight, and race of the transferee, and certification by the transferee that he is not prohibited by the Act or Title VII of the Omnibus Crime Control and Safe Streets Act of 1968 (82 Stat. 236; 18 U.S.C. Appendix) from receiving a firearm in interstate or foreign commerce. The licensee shall identify the firearm to be transferred by listing in the Form 4473 the name of the manufacturer, the name of the importer (if any), the type, model, caliber or gauge, and the serial number of the firearm. Before transferring the firearm described in Form 4473, the licensee (1) shall cause the transferee to identify himself in any manner customarily used in commercial transactions (e.g., a driver's license), and shall note on the form the method used, and (2) if satisfied that the transferee is lawfully entitled to receive the firearm, shall sign and date the form.

STATEMENT

The respondents in this cause are Jo Anne Franco, wife and administratrix of the estate of Gene A. Franco, deceased, on behalf of the estate and also the heirs of the deceased, Jo Anne Franco, wife; Gene Allen Franco and Jon David Franco, minor children of the deceased and Eddie Hawkins, individually and James T. Ames, father and administrator of the estate of Kenneth Melvin Ames, deceased, on behalf of the estate and also the heirs of the deceased, James T. Ames, father; Willow Dean Ames, mother; and Carol Ann Snodgrass, sister. An action for wrongful death and personal injuries was filed by the Respondents herein in the Circuit Court of Washington County, Arkansas on June 17, 1974. The respondents alleged that the Petitioners were negligent in the sale of a handgun to Daniel Lon Graham (alias Bill Shaw), an escaped prisoner. The respondents also alleged that the Petitioners violated regulations issued pursuant to the Gun Control Act of 1968 in that they did not receive Mr. Graham's driver's license number prior to the sale of the gun. However, at the time of the purchase of the gun, which was Mr. Graham's secondary objective for entering the store, he instructed the employees present that the washer and dryer which he purchased at that time were to be installed early the next morning, before his wife returned home. He gave very detailed directions on how to reach his residence and because the employees were familiar with the area, they had no reason to believe that Mr. Graham was not being truthful. The employees of the store did in fact ask Mr. Graham for his driver's license prior to the sale of the gun in accordance with the regulations. However, he explained that he had been brushhogging that day and had left his wallet at home. According to the testimony of all

the witnesses this was a valid explanation because of the way in which Mr. Graham was attired. Therefore, the parties agreed that the driver's license number of Mr. Graham would be obtained the next day when the washer and dryer were delivered.

The employees, when attempting to deliver the washer and dryer the next day, discovered that Mr. Graham did not live in the area and no one knew him. Mr. Graham had used a ficticious name and address in purchasing the washer, dryer, and gun. The store then contacted the bank upon which Mr. Graham had written a check and found the check to be worthless. They then contacted the Rogers, Arkansas Police Department and informed them of the purchase of the gun.

That evening, June 18, 1971, Mr. Graham perpetrated a robbery on a grocery in Springdale, Arkansas killing two employees and injuring a third. The present action arose out of this set of events.

After pleadings, which contained allegations of violations of the Gun Control Act and regulations promulgated pursuant thereto, the Petitioners moved for summary judgment. Briefs were filed which focused upon the issues of the Gun Control Act and regulations. The Circuit Judge of Washington County, Arkansas, granted the Petitioners' motion for summary judgment. The Judge held that the sale of the weapon to Graham was not negligent per se in the absence of some knowledge of the likelihood or predisposition of the purchaser to commit a crime or take part in some negligent act as required by the substantive provisions of the Gun Control Act.

On appeal, the Supreme Court of the State of Arkansas, reversed and remanded the case as applied to the petitioners

herein. The Court, when speaking of the Gun Control Act and regulations stated that:

> . . . Graham had no means of identification —an essential prerequisite to the purchase of a gun. That is not, as the appellees argue, a mere matter of record keeping. Form 4473 required the seller to obtain and record Graham's identification *before* handing over the gun.

In effect, the Arkansas Supreme Court has decided as a matter of law that the failure of the licensed gun dealer to obtain a purchaser's driver's license prior to the sale of a handgun is negligence per se. Also, that even mere record keeping violations of either the Gun Control Act or its regulations are negligence which can be admissible in an action for civil damages. Because of the important issues involved, the Petitioners then sought certiorari in this case.

Although some question may arise initially as to whether the decision of the Arkansas Supreme Court was "final", the petitioners submit that it was final as to the federal issues involved and is, therefore, ripe for decision by this Court. The purpose of the "finality" requirement under Section 1257 has been stated to be to avoid piecemeal appeals and economic waste. *Radio Station WOW v. Johnson*, 326 U.S. 120 (1945). However, this Court has stated that the "finality" requirement definitely has a "penumbral" area. *Radio Station WOW v. Johnson*, 326 U.S. 120 (1945). Also, in *Mills v. Alabama*, 384 U.S. 214 (1966) the Supreme Court of the State of Alabama had reversed and remanded for trial, a lower court's ruling. This Court nevertheless granted certiorari, and when speaking on the "finality" requirement stated:

> This argument has surface plausibility, since it is true the judgment of the State Supreme Court did not

literally end the case. It did, however, render a judgment binding upon the trial court that it must convict Mills under this state statute if he wrote and published the editorial. Mills concedes that he did, and he therefore, has no defense in the Alabama trial court. (384 U.S. 214, 217).

Other cases in which certiorari was granted after the highest court of a state had reversed a judgment are *Richfield Oil Corp. v. State Board,* 329 U.S. 69 (1946) and *Pope v. Atlantic Coast Line R. Co.,* 345 U.S. 379 (1952). In the *Richfield Oil* case, *supra*, this Court stated at 329 U.S. 72 that:

> The question is whether it can be said that "there is nothing more to be decided" (*Clark v. Williard,* 292 U.S. 112, 118), that there has been "an effective determination of the litigation." *Market Street Ry. Co. v. Railroad Commission,* 324 U.S. 548, 541.

Finally, this Court in *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469 (1975) stated that:

> The Georgia Supreme Court's judgment is plainly final on the federal issue and is not subject to further review in the State Courts. Appellants will be liable for damages if the elements of the state cause of action are proved.

Because of the citations set out above, the Petitioners respectfully urge this Court to view this case as being a "final judgment" in regard to the federal issues involved. The applicability and construction of the Gun Control Act of 1968 has been determined by the Supreme Court of the State of Arkansas and will not be subject to further review by the courts in Arkansas. Also, on remand the federal issue

will not be involved. Even more importantly, if the Arkansas Supreme Court incorrectly decided this issue, which the Petitioners assert it did, there should be no trial. Therefore, the Petitioners submit that the determination of the federal issue was "final" for purposes of Section 1257.

REASONS FOR GRANTING THE WRIT

(1) The decision of the Court below in the instant case is in conflict with the Congressional intent in enacting the Gun Control Act and will have serious and far reaching consequences if sustained. The effect of the decision below is to make the licensed dealer an insurer of the safety of all persons who may be injured by the use of the gun.

The petitioners submit that under the provisions of Rule 19 of this Court there are special and important reasons for granting the writ. This case involves the construction and applicability of the Gun Control Act and its regulations to a civil proceeding. In the past, this Court has exercised its certiorari power where the construction or application of a statute was involved. In *United States v. Ruzicka,* 329 U.S. 287 (1946) this Court stated:

> We brought this case here, 327 U.S. 776, because it raises questions of importance in the administration of the Agricultural Marketing Agreement Act of 1973.

Also, this Court has exercised its certiorari power where novel and important questions were presented and there was a likelihood that the problem would be a recurring one. (*United States v. Standard Oil Co.,* 332 U.S. 301).

Because of this authority, the petitioners submit that the issues presented are novel and important; that no reported decisions can be found concerning the Act's con-

struction and applicability in civil proceedings; and the issues need to be determined because there is a great likelihood that many similar cases will be presented in the future.

(2) The Supreme Court of the State of Arkansas held that the purpose of the Gun Control Act was to keep firearms out of the hands of criminals and fugitives from justice. This may indeed be true of the substantive provisions of the Act, none of which the petitioners violated.

However, the purposes of the bookkeeping regulations alleged to have been violated by the petitioner were (1) to provide the source by which the Treasury Department agents can verify compliance with the Congressional enactment and (2) to provide a support function for law enforcement personnel by enabling them to trace the ownership of weapons used in the commission of crimes. This distinction between substantive and bookkeeping provisions is pointed out by two cases. In *Huddleston v. United States,* 415 U.S. 814 (1974), a felon falsified Form 4473 in order to pawn firearms. This violated the substantive provisions of the Act. Therefore, his conviction was upheld, with the court finding the Congressional intent to have been to deprive the juvenile, the mentally incompetent, the criminal and the fugitive of the use of firearms. However, in *McLemore v. United States Treasury Department,* 317 F. Supp. 1077 (N.D. Fla. 1970), the Court upheld the revocation of a dealer's license where the required Form 4473 was not being maintained.

The petitioners therefore contend that there is a distinction in the construction to be given to the substantive and bookkeeping provisions of the Act, and the Arkansas Supreme Court failed to draw such distinction.

(3) The petitioners also submit that the phrase "... any manner customarily used in commercial transaction..." contained in 27 C.F.R. Section 178.124(c) needs to be defined and focused upon. The opinion of the Court below, in effect, holds that the failure of the licensed gun dealer to obtain the purchaser's driver's license prior to handing over the gun is negligence per se. The Court apparently left no room for identification by other means. Therefore, the construction of the phrase needs to be determined so that licensed dealers in the future may know the effect of the language contained in 27 C.F.R. Section 178.124(c). If a mere violation of a record keeping provision is negligence as a matter of law, and if the only commercially reasonable manner of identification is by driver's license, then the dealers need to be aware of this.

Although there is no conflict on this issue between Circuit Courts of Appeal or the various jurisdictions, this Court in *Kolovrat v. Oregon,* 366 U.S. 187, 191 stated:

> Despite the absence of a conflict, state court decisions involving the construction and application of federal statutes or treaties may be reviewed where the question is sufficiently important.

In conclusion, the petitioners submit that the issues presented in this case are very important and special and are of vital concern to gun dealers in this country. If the decision of the Court below is sustained, the burden placed on the gun dealers would be an impossible one. It would place upon their shoulders the responsibility for all injuries caused by firearms whenever an injury might result from a sale that was not consummated exactly according to the regulations laid down by the Secretary of the Treasury. In essence, it would make the licensed dealers the enforcers

of the gun laws. The end result of this would be that gun dealers could not stay in business if they were faced with this absolute liability.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfuly submitted,

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June 17, 1977

Appendix "A"

Jo Anne Franco, Administratrix, et al ..... *Appellants*

v.

Marion A. Bunyard,et al ..... *Appellee*

No. 76-176.

Supreme Court of Arkansas,
In Banc.

Feb. 28, 1977.

Rehearing Denied March 28, 1977.

Action for wrongful deaths and personal injuries was brought against store, its president, manager, and principal stockholder, and against its national affiliate, alleging that pistol was sold, in violation of federal statute and regulations, to escaped convict who used pistol to murder two men and wound a third. The Circuit Court, Washington County, Maupin Cummings, J., entered judgment granting defendants' motion for summary judgment, and plaintiffs appealed. The Supreme Court, George Rose Smith, J., held that questions of fact existed as to liability of store, precluding summary judgment, and that there was no basis for finding of national affiliate's liability on theory of agency or joint venture.

Affirmed in part; reversed and remanded in part.

1. Judgment, Key 181(33)

In action seeking recovery for wrongful deaths and personal injuries brought against store at which pistol was allegedly sold, in violation of federal statute and regulations, to escaped convict who used pistol to murder two

men and wound a third, questions of fact as to liability of store existed, precluding summary judgment.

2. Negligence, Key 6

Violation of statute or valid regulation is ordinarily evidence of negligence.

3. Weapons, Key 3

Federal statute and regulations governing sale of handguns and requiring that buyer produce identification are not a mere matter of record keeping, but have purpose of keeping pistols out of hands of such persons as convicted criminals and fugitives from justice.

4. Negligence, Key 10

It is not required that precise sequence of events leading to injury be foreseeable.

5. Weapons, Key 18(1)

In wrongful death and personal injury action brought against store at which pistol was allegedly sold, in violation of federal statute and regulations, to escaped convict who used pistol to murder two men and wound a third, and its national affiliate, there was no basis for finding of liability against national affiliate on theory of agency or joint venture, in absence of any power on part of national affiliate to control actions of store.

McMath, Leatherman & Woods, Little Rock, John Lisle, Springdale, for appellants.

Putman, Davis & Bassett, Fayetteville, Kelley & Luffman, Rogers, for Marion A. Bunyard, Individually and

Bunyard Supply Co., Inc. d/b/a Western Auto Supply, an Arkansas Corp.

Wayne Harris, Warner & Smith, Fort Smith, for Western Auto Supply Co.

GEORGE ROSE SMITH, Justice.

Early in June, 1971, Daniel Lon Graham, serving a life sentence for kidnaping, escaped from the state penitentiary. Late in the afternoon of June 17 he bought a secondhand pistol at Bunyard Supply Company, Inc., in the city of Rogers. The seller assertedly violated a federal statute and federal regulations in making the sale. On the next day Graham robbed a grocery store in Springdale, taking three young employees as hostages. In a nearby wooded area Graham used the gun to murder two of the young men and wounded the third.

This action for the wrongful deaths and personal injuries was brought by the appellants against Bunyard Supply, against Marion A. Bunyard, its president, manager, and principal stockholder, and against the company's national affiliate, Western Auto Supply Company. Upon the basis of extensive discovery depositions and similar proof, the defendants moved for summary judgment on the ground that there was no genuine issue as to any material fact. This appeal is from a judgment granting the motion. The trial judge reasoned that Graham's criminal use of the gun was an intervening efficient cause not foreseeable by the seller.

The federal gun control law and regulations were examined by the Supreme Court in *Huddleston v. United States*, 415 U.S. 814, 94 S. Ct. 1262, 39 L. Ed. 2d 782 (1974). As stated in that opinion, Congress was concerned with the

widespread traffic in firearms and the ease with which they could be obtained by criminals and others not legally entitled to possess them. The court noted that the principal agent in the scheme of federal enforcement of the law is the licensed dealer. He is required to keep records of [acquisition and] disposition and is criminally liable for disposing of a weapon contrary to the Act. Information drawn from the records kept by licensed dealers is a prime guarantee of the Act's effectiveness in keeping lethal weapons out of the hands of criminals.

The regulations issued under the Act are, in our opinion, the real key to its enforcement. The regulations require the licensed dealer, *prior* to making an over-the-counter delivery of a firearm to a purchaser, to complete Form 4473, the Firearms Transaction Record. That record must show the buyer's name, address, date and place of birth, height, weight, and race, and must include his signed certification that he has not been convicted of a crime punishable by imprisonment for more than one year and that he is not a fugitive from justice. The seller, *before* transferring the gun, must require the buyer to identify himself in any manner customarily used in commercial transactions, as by a driver's license. Form 4473 requires the number on the identification, such as the driver's license number, to be entered on the form.

According to the proof as a whole, and especially the affidavit of Howard McDaniel, the Bunyard clerk who made the sale, there was not even a token compliance with the law. Graham entered the store an hour or so before the 5:30 closing time. He first negotiated for the purchase of a clothes washer and drier (to be delivered the next morning, to a fictitious address), evidently as a ruse for obtaining a

pistol. He then inquired about buying a used gun, to protect his chickens against dogs. He had no wallet, no money, no driver's license, no identification of any kind. Even so, after giving a worthless check for more than $400 for the washer-drier and the gun, he was allowed to leave the store with the pistol without even signing Form 4473, as required by the regulations. According to McDaniel, that form was not filled out until the next day, after it was learned that the store had been duped. There were, of course, omissions in the form as filled out, such as Graham's driver's license number. Again according to McDaniel, he forged the name that Graham had given (Bill Shaw). Marion Bunyard signed the required certification that "it is my belief that it is not unlawful for me to sell . . . the firearm" to the purchaser.

[1-4] We have no doubt that upon the issue raised by the motion for summary judgment and argued here, the proof presents questions of fact as to the liability of Bunyard Supply. (The separate liability of Marion Bunyard is not argued.) The violation of a statute or valid regulation is ordinarily evidence of negligence. *Bussell v. Missouri Pac. R. R.*, 237 Ark. 812, 376 S.W. 2d 545 (1964); AMI Civil 2d, 601 (1974). On the issue of proximate cause, it is enough to point out that the tragedies could not have occurred as they did if the federal rules had been obeyed. That is, Graham had no means of identification — an essential prerequisite to the purchase of a gun. This is not, as the appellees argue, a mere matter of record keeping. Form 4473 required the seller to obtain and record Graham's identification *before* handing over the gun. Graham had no identification. Thus, had the law been obeyed, he could not have obtained possession of the gun and could not have

used it to shoot innocent men the next day. On the issue of foreseeability, we need say only that the very purpose of the law is to keep pistols out of the hands of such persons as Graham, who was both a convicted criminal and a fugitive from justice. It certainly cannot be said that his use of the gun in such a way as to injure others was not foreseeable. Of course it is not required that the precise sequence of events leading to the injury be foreseeable. *Helena Gas Co. v. Rogers*, 104 Ark. 59, 147 S.W. 473 (1912).

[5] There is, however, no proof of liability on the part of Western Auto Supply Company. It is a national concern having company-owned and home-owned stores throughout the country. Bunyard Supply did business as Western Auto Supply, but it was home-owned and so identified to the public. In the franchise contract Bunyard Supply reserved to itself the "ownership, management, and control" of the store. The national chain agreed to sell its various brands of merchandise to the local store, but the vital power of control remained with Bunyard. And, specifically, the federal license to sell guns was issued to Bunyard Supply, not Western Auto Supply Company. There was certainly no partnership between the two companies; so, in the absence of any power on the part of Western Auto Supply Company to control the actions of Bunyard Supply, there is no basis for a finding of liability on the theory of agency or joint venture. *Hinson v. Culberson Stowers Chevrolet*, 244 Ark. 853, 427 S.W. 2d 539 (1968); *Bennett v. Gundolf*, 238 Ark. 582, 383 S.W. 2d 289 (1964).

As to Western Auto Supply Company, the judgment is affirmed; as to Bunyard Supply Company and Marion Bunyard, the judgment is reversed and the cause remanded.

Appendix "B"

IN THE CIRCUIT COURT OF WASHINGTON COUNTY, ARKANSAS

JO ANNE FRANCO, WIFE AND ADMINISTRATRIX OF THE ESTATE OF GENE A. FRANCO, DECEASED, ON BEHALF OF THE ESTATE AND ALSO THE HEIRS OF THE DECEASED, JO ANNE FRANCO, WIFE; GENE ALLEN FRANCO AND JON DAVID FRANCO, MINOR CHILDREN OF THE DECEASED,

AND

EDDIE HAWKINS, INDIVIDUALLY,

AND

JAMES T. AMES, FATHER AND ADMINISTRATOR OF THE ESTATE OF KENNETH MELVIN AMES, DECEASED, ON BEHALF OF THE ESTATE AND ALSO THE HEIRS OF THE DECEASED, JAMES T. AMES, FATHER; WILLOW DEAN AMES, MOTHER; AND CAROL ANN SNODGRASS, SISTER ..... *Plaintiffs*

VS. No. CIV. 74-406

MARION A. BUNYARD, INDIVIDUALLY

AND

BUNYARD SUPPLY CO., INC. d/b/a WESTERN AUTO SUPPLY, AN ARKANSAS CORPORATION

AND

WESTERN AUTO SUPPLY COMPANY ..... *Defendants*

ORDER

Separate Defendants, Marion A. Bunyard, individually, and Bunyard Supply Co., Inc., d/b/a Western Auto Supply

have moved for Summary Judgment on the Complaint, as amended, of the Plaintiffs alleging that there is no genuine issue as to any material fact pursuant to *Ark. Stat. Ann.* Sec. 29-211 (Repl. 1962).

Affidavits of Steve Barnes, Howard McDaniel, Marion Bunyard, Chief of Police Jack Cole, Rogers Police Department, and testimony of Howard McDaniel in Case of State of Arkansas vs. Daniel Lon Graham and depositions of Howard McDaniel, Marion A. Bunyard, George Dillard, and Vernon Brown.

Plaintiffs responded to Motion of Defendants with Brief and a new Affidavit of Howard McDaniel dated June 13, 1975.

After considering the pleadings, briefs, oral arguments, affidavits and depositions the Court finds the Motion of Defendants for Summary Judgment of dismissal should be granted.

1. Plaintiffs allege in their Complaint, a violation of a Criminal Statute 26 CFR 178 Sec. 99, is negligence per se (1) by selling a .22 caliber pistol without requiring proof of buyer's identification as required by *Title* 18 *USC* and by (2) making false entries in *The Fire Arms Transaction Record, Form* 4473 *Title* 26, *Part* 178, 124(c) *Code Federal Regulations* part 178.

Plaintiffs further allege negligence on Defendants part in not notifying proper authorities after Defendants acquired knowledge of the fraud on part of Daniel Lon Graham alias Bill Shaw.

The affidavit of Jack Cole, Rogers Chief of Police is undisputed that he was notified by Defendant, Bunyard, of the illegal acts of Daniel Lon Graham on June 18, 1971.

2. No allegation was made in the Complaint that Defendants knew or had reasonable cause to believe Daniel Lon Graham alias Bill Shaw was:

(a) under indictment or had been convicted of a crime punishable by one year imprisonment;

(b) Fugitive from justice.

3. Defendants are not accused of violating a safety regulation which applies to specific classes of persons as covered by *Underwood v. U. S.*, 356 F. 2d 92; *Spires v. Goldberg*, 106 S.E. 585; *Mays v. Richie Grocery*, 177 Ark. 35, and *Sutton Administrator v. Wood*, 120 Ky. 23.

No case in the State or Federal Courts could be found directly in point covering the issues raised by the pleadings.

The sale of a weapon without completing the legal forms in the absence of some knowledge of the likelihood or predisposition of the purchaser to commit a crime or take part in some negligent act cannot be said to be negligence per se, due to the lack of any element of foreseeability.

In *Collier v. Citizen Coach Co.*, 231 Ark. 289 (1959) the Court states:

> "Moreover, when the voluntary acts of human beings *intervene between the defendant's act and the plaintiffs injury*, the problem of foreseeability is still the same: was the third person's conduct sufficiently foreseeable to have the effect of making the defendant's act a negligent one?"

Also in *Lindle v. Shelby*, 249 Ark. 671 (1970) the Court said:

"If the negligence complained of *merely furnishes a condition by which the injury was possible and a subsequent independent act caused the injury*, the existence of such condition is not the proximate cause of the injury."

Assuming the sale of the gun was contrary to the Federal Law and regulations and negligence per se, still the subsequent activity of Daniel Lon Graham, alias Bill Shaw, in robbing the Safeway Store and shooting and killing the plaintiffs was an intervening, efficient, intentional, criminal act which a reasonable person in selling the weapon could not be expected to foresee under the undisputed facts set forth in the depositions and affidavits attached to the Motions for Summary Judgment.

The Plaintiffs contend and argue that if Defendants could foresee some danger to others from selling a weapon without proper identification, no matter how unforeseeable, then Defendants are liable. *Professor Prosser* points out why this view is wrong and comparing *reasonable foreseeability* and *some foreseeability*:

"It is here at least that the line must of necessity be drawn to terminate the defendant's responsibility. The Courts have exhibited a more or less instinctive feeling that it would be unfair to hold him liable. The virtually unanimous agreement that the liability must be limited to cover only those intervening causes which lie within the scope of the foreseeable risk, or have at least some *reasonable connection with it*, is based upon a recognition of the fact that the independent causes which may intervene to change the situation created by the defendant *are infinite*, and that as a practical matter

responsibility simply cannot be carried to such lengths." *Prosser on Torts*, §44, 4th Ed. (1971).

The Court does not pass upon the contentions of Plaintiffs regarding the status and relationship of Bunyard Supply Co., Inc., d/b/a Western Auto Supply Co.

IT IS THEREFORE ORDERED AND ADJUDGED, that the Complaint as amended of Plaintiffs should be and is hereby dismissed with prejudice. Defendants object and except.

/s/ Maupin Cummings
Circuit Judge, First Division

APPENDIX "C" FOLLOWS:

Appendix "C"

DEPARTMENT OF THE TREASURY BUREAU OF ALCOHOL, TOBACCO AND FIREARMS **FIREARMS TRANSACTION RECORD** **PART I – INTRA-STATE OVER-THE-COUNTER**	TRANSFEROR'S TRANSACTION NO.

NOTE: Please read and carefully follow instructions on reverse. Prepare an original only. Please type or print in ink.

SECTION A – MUST BE COMPLETED PERSONALLY BY TRANSFEREE (BUYER) (See Instruction 3)

1. TRANSFEREE'S *(Buyer's)* NAME *(Last, First, Middle) (Mr., Mrs., Miss.)*	2. HEIGHT	3. WEIGHT	4. RACE

5. RESIDENCE ADDRESS *(No., Street, City, State, Zip Code)*	6. DATE OF BIRTH	7. PLACE OF BIRTH

8. CERTIFICATION OF TRANSFEREE *(Buyer)* – An untruthful answer may subject you to criminal prosecution. Each question must be answered with a "yes" or a "no" inserted in the box at the right of the question:

a. Are you under indictment or information in any court for a crime punishable by imprisonment for a term exceeding one year?		d. Are you an unlawful user of, or addicted to, marihuana, or a depressant, stimulant, or narcotic drug?	
b. Have you been convicted in any court of a crime punishable by imprisonment for a term exceeding one year? (Note: The actual sentence given by the judge does not matter–a yes answer is necessary if the judge could have given a sentence of more than one year. Also, a "yes" answer is required if a conviction has been discharged, set aside, or dismissed pursuant to an expungement or rehabilitation statute.)		e. Have you ever been adjudicated mentally defective or have you ever been committed to a mental institution?	
		f. Have you been discharged from the Armed Forces under dishonorable conditions?	
		g. Are you an alien illegally in the United States?	
c. Are you a fugitive from justice?		h. Are you a person who, having been a citizen of the United States, has renounced his citizenship?	

I hereby certify that the answers to the above are true and correct. I understand that a person who answers any of the above questions in the affirmative is prohibited by Federal law from purchasing and/or possessing a firearm. I also understand that the making of any false oral or written statement or the exhibiting of any false or misrepresented identification with respect to this transaction is a crime punishable as a felony.

TRANSFEREE'S *(Buyer's)* SIGNATURE	DATE

SECTION B – TO BE COMPLETED BY TRANSFEROR (SELLER)

THE PERSON DESCRIBED IN SECTION A: ☐ IS KNOWN TO ME ☐ HAS IDENTIFIED HIMSELF TO ME IN THE FOLLOWING MANNER

9. TYPE OF IDENTIFICATION *(Driver's License, etc. Positive identification is required. A Social Security card is not considered positive identification.)*	10. NUMBER ON IDENTIFICATION

On the basis of: (1) the statements in Section A; (2) the verification of identity noted in Section B; and (3) the information in the current list of Published Ordinances, it is my belief that it is not unlawful for me to sell, deliver or otherwise dispose of the firearm described below to the person identified in Section A.

11. TYPE *(Pistol, rifle, etc.)*	12. MODEL	13. CALIBER OR GAUGE	14. SERIAL NO.

15. MANUFACTURER *(and importer, if any)*

16. TRADE/CORPORATE NAME AND ADDRESS OF TRANSFEROR *(Seller) (Hand stamp may be used)*	17. FEDERAL FIREARMS LICENSE NO.

18. TRANSFEROR'S *(Seller's)* SIGNATURE	19. TRANSFEROR'S TITLE	20. TRANSACTION DATE

ATF FORM 4473 - PT 1 (3-76) EDITION OF 10-75 MAY BE USED

INSTRUCTIONS

1. Only ONE ATF Form 4473, Part I, is required for each intra-State over-the-counter transaction. The form is retained by the seller and filed as indicated in Instruction 8.

2. All signatures required on this form must be in ink. All other entries on the form must be typewritten or be printed in ink.

3. The buyer (transferee) of a firearm will, in every instance, personally complete Section A of the form and certify (sign) that the answers are true and correct. If, because of inability of the buyer to read or write, the answers are written by another person, this person and another person will sign as witnesses to the buyer's answers and/or signature. Should the buyer's name be illegible, the dealer shall print the buyer's name above the name printed by the buyer.

4. When the transferee (buyer) of a firearm is a corporation, company, association, partnership or other such business entity, an officer authorized to act on behalf of the business will sign the certification in Section A of the form and attach a written statement, executed under the penalty of perjury, stating

(a) that the firearm is being acquired for the use of and will be the property of that business entity, and
(b) the name and address of that business entity.

5. The transferor (seller) of a firearm will, in every instance, complete Section B of the form.

6. If more than one firearm is involved, the identification required by Section B, Items 11 through 15, must be provided for each firearm. The identification of the firearms transferred in a transaction which covers more than one weapon may be on a separate sheet of paper, which must be attached to the form covering the transaction.

7. The transferor (seller) of the firearm is responsible for determining the lawfulness of the transaction and for keeping proper records of the transaction. Consequently, the transferor should be familiar with the provisions of the Gun Control Act of 1968 (U.S.C., Title 18, Chapter 44) and Title VII, Unlawful Possession or Receipt of Firearms, (82 Stat. 197), and 27 CFR Part 178, (Commerence in Firearms and Ammunition).

8. Upon completion of the firearm transaction, the transferor (seller) must make a part of his permanent firearms records the form recording that transaction and any supporting documents. Forms 4473, Part I, and any supporting documents must be filed either chronologically by date of transaction, alphabetically by name of transferee (buyer), or numerically by transaction number if the transferor assigns transaction numbers to the forms.

9. In addition to completing this record, the licensee shall report any multiple sale or other disposition of pistols or revolvers on ATF F 3310.4, in accordance with 27 CFR 178.126a.

10. Additional forms are available from:

Bureau of Alcohol, Tobacco and Firearms
ATF Distribution Center
3800 S. Four Mile Run Drive
Arlington, Virginia 22206

NOTICE:

Under 18 U.S.C. Chapter 44 and Title VII of Public Law 90-351, 18 U.S.C. Appendix 1201-1203, as amended, firearms may not be sold to or received by certain persons. The information and certification on this form are designed so that a person licensed under Chapter 44 may determine if he may lawfully sell or otherwise dispose of a firearm to the person identified in Section A, and to alert the transferee (buyer) of certain restrictions on the receipt and possession of firearms.

THIS FORM SHOULD NOT BE USED FOR SALES OR TRANSFERS WHERE NEITHER PERSON IS LICENSED UNDER CHAPTER 44 OF TITLE 18 U.S.C.

DEFINITIONS

1. Intra-State Over-the-Counter Transaction – The sale or other disposition of a firearm by the transferor (seller) to a transferee (buyer), who is a resident of the state in which the transferor's business is located, occurring on the transferor's business premises.

2. *Published Ordinances* – The publication containing those State laws and local ordinances relevant to the enforcement of Chapter 44 of Title 18, U.S.C., which is annually published in the Federal Register and distributed to each Federal firearms licensee by the Director, Bureau of Alcohol, Tobacco and Firearms.

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